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Case C-442/02, *Caixa-Bank France v. Ministère de l'Économie, des Finances et de l'Industrie*, judgment of the Grand Chamber of 5 October 2004, nyr.

## 1. Introduction

Confirming a trend started with the *Gebhard* judgment,<sup>1</sup> and consistently with its case law on free movement of capital,<sup>2</sup> the Court in *Caixa-Bank* held that a non-discriminatory rule prohibiting remuneration on sight accounts is an unjustified barrier to the freedom of establishment. Even though the ruling is consistent with the previous broad interpretation given to the free movement provisions, the case is exemplary of the issues arising once a supranational court decides to substitute its own judgment for that of the competent regulator. Thus, in just twenty-four paragraphs and with no market analysis, the Court is satisfied that the rule is a barrier to market access, and that, even though the rule “is indeed suitable for encouraging medium and long-term saving”, it is not justified. No consideration is given to the fact that regulation in a field as complex as the banking sector, where the consumer might be particularly vulnerable, is informed by complex policy choices, and might pursue welfare as well as economic aims. Once more then the Court has decided to substitute its own judgment for that of the national regulator in relation to measures which did not discriminate against foreign undertakings; this time however it is not clear that the Court’s assessment strikes the correct balance between market deregulation and consumer protection.

1. Cf. Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, [1995] ECR I-4165; Case C-108/96, *D Mc Quen et al v. Grandivision Belgium SA*, [2001] ECR I-837; C-294/00, *Deutsche Paracelsus Schulen für Naturheilverfahren GmbH v. K Gräbner*, [2002] ECR I-6515; Case C-79/01, *Payroll Data Services (Italy) et al*, [2002] ECR I-8923.

2. See e.g. the “golden shares” cases, Case C-367/98, *Commission v. Portugal*, [2002] ECR I-4732; Case C-483/99, *Commission v. France*, [2002] ECR I-4781; Case C-503/99, *Commission v. Belgium*, [2002] ECR I-4809; Case C-98/01, *Commission v. UK* (BAA golden share), [2003] ECR I-4641.

## 2. Factual background and Advocate General Tizzano's Opinion

Caixa-Bank, a French subsidiary of a Spanish bank, was prohibited by the French committee for banking regulation from marketing a "sight" account bearing a 2 percent interest on balances of EUR 1500 or more, since French law provided that sight accounts may not be remunerated.<sup>3</sup> Caixa-Bank appealed to the *Conseil d'État* arguing *inter alia* that such rules conflicted with Article 43 EC, as interpreted in the *Kraus*, *Gebhard* and *Pfeiffer* rulings.<sup>4</sup> The *Conseil d'État* referred the case to the European Court of Justice enquiring as to the compatibility of such rules with the freedom of establishment, and on the existence of possible justifications.

Mr Tizzano started by noting that, contrary to what was argued by the Commission, the Codified Banking Directive (2000/12)<sup>5</sup> was not relevant since its mutual recognition regime applies only to branches (i.e. offices without autonomous legal personality), and not to subsidiaries, which – having legal personality – are in principle subject to the control and authorization procedures of the host State.<sup>6</sup> He then turned to analyse the consistency of the French rules at issue with Article 43 EC. The main matter debated by the parties was whether a measure might fall within the scope of the Treaty for the sole reason that it discourages the pursuit of an economic activity; or whether a discriminatory effect or at least an effect on the ability to take up an activity (a direct market access barrier) is necessary. Mr Tizzano acknowledged that, given the confusing state of the law in the field of free movement of persons, both interpretations were possible. He then proceeded

3. For an interesting assessment of the EU banking market see Lahusen, *Bank performance in Europe: great progress through consolidation – except in Germany*, EU Monitor (Deutsche Bank Research), Financial Market Special, 28 June 2004, issue no. 13, [www.dbresearch.com/PROD/DBR\\_INTERNET\\_EN-PROD/PROD0000000000175992.pdf](http://www.dbresearch.com/PROD/DBR_INTERNET_EN-PROD/PROD0000000000175992.pdf)

4. Case C-19/92, *D Kraus v. Land Baden-Württemberg*, [1993] ECR I-1663; *Gebhard*, *supra* note 1; Case C-255/97, *Pfeiffer Großhandel GmbH v. Löwa Warenhandel GmbH*, [1999] ECR I-2835.

5. Directive 2000/12, relating to the taking up and pursuit of the business of credit institutions, O.J. 2000, L 126/1; the Commission has now proposed some amendments to the Directive, see Proposal for Re-casting Directive 2000/12 of the European Parliament and of the Council of 20 March 2000, relating to the taking up and pursuit of the business of credit institutions, and Council Directive 93/6/EEC of 15 March 1993, on the capital adequacy of investment firms and credit institutions, COM(2004)486 final. For an evaluation of the Codified Banking Directive see Alpa "The Harmonization of EC Law of Financial Markets in the Perspective of Consumer Protection", 15 EBL Rev. (2004), 347.

6. For a critical appraisal of the conflict of laws problems which might derive from the regime set out by the Directive, see Dasselme "Banking Secrecy after the *Der Weduwe* Case: An Obstacle to the Free Movement of Cross-Border Banking Services", 7 *EC Tax Journal* (2003/4), 49.

to suggest an analytical framework capable, in his opinion, of explaining most of the case law. He argued that the rulings in *Kraus*, *Gebhard*, *McQuen* and *Payroll*<sup>7</sup> involved national measures which “directly restricted access to a regulated profession by means that were *potentially discriminatory*”.<sup>8</sup> He admitted that the ruling in *Pfeiffer*<sup>9</sup> could lend some authority to Caixa-Bank’s submission that mere discouragement of the exercise of Article 43 EC rights is enough to trigger the Treaty. In that case, the Court had found that a national rule prohibiting the use of a certain trade name because of the risk of confusion with the name used by a competitor was a restriction on freedom of establishment. The Advocate General then turned to other case law to support his view that the Treaty prohibits only measures that “directly *impede* the taking up of an economic activity or are *by nature* substantially *discriminatory* because they do not ensure equal conditions both in law and in fact as regards the taking up and pursuit of an economic activity”.<sup>10</sup> As authority for his view he relied in particular on the *Alpine* and *Graf* cases.<sup>11</sup> In *Alpine*, the Court found that the rule at issue – a ban on cold-calling for financial service providers which applied regardless of the domicile of the prospective client – was caught by Article 49 EC because it “directly affected access” to other Member States’ markets.<sup>12</sup> In *Graf*, the Court found that a rule which provided compensation for termination of an employment contract only in the case of unjustified dismissal and not in the case of voluntary resignation, was not caught by the Treaty as it did not “affect access of workers to the labour market”.<sup>13</sup>

Mr Tizzano then concluded that he had difficulties in finding that measures which merely reduce the attractiveness of pursuing an economic activity should be, for that sole reason, considered barriers to movement. To say so, he argued, would conflict with the system of allocation of powers set out in the Treaty; in the absence of harmonization Member States should be

7. *Kraus*, *supra* note 4; *Gebhard*, *supra* note 1; *Mc Quen*, *supra* note 1; *Payroll Data Services*, *supra* note 1.

8. Opinion, para 38, emphasis added. Mr Tizzano did not explain why in his opinion the measures at issue in those cases were potentially discriminatory. Whilst the rules in *Kraus* had a discriminatory effect on movers, it is more difficult to understand how the rules at issue in the other cases could have a potential discriminatory effect.

9. Case C-255/97, *Pfeiffer Großhandel GmbH v. Löwa Warenhandel GmbH*, [1999] ECR I-2835.

10. Opinion, para 47, emphasis in the original.

11. Case C-384/93, *Alpine Investments BV v. Minister van Financiën*, [1995] ECR I-1141; Case C-190/98, *V Graf v. Filzmoser Maschinenbau GmbH*, [2000] ECR I-437.

12. Case C-384/93, *Alpine Investments BV v. Minister van Financiën*, [1995] ECR I-1141, para 28.

13. Case C-190/98, *V Graf v. Filzmoser Maschinenbau GmbH*, [2000] ECR I-437, para 23.

able, in principle, to regulate the pursuit of economic activity in a non-discriminatory manner; otherwise economic operators would be able to challenge any national measure on the sole grounds that it narrows their profit margin. If that were the case the Treaty would be construed as establishing a market in which rules are prohibited as a matter of principle (subject to justification), rather than just a single market where operators can move freely. Therefore, only discriminatory measures and measures which directly affect market access should fall within the scope of the Treaty.

Having set out his views on the appropriate scope of the Treaty, Advocate General Tizzano turned to assess the compatibility with Article 43 EC of the prohibition of remuneration for sight accounts. In his opinion those rules would be caught only if directly discriminatory, or aimed at regulating access to the banking market; or if they discriminated in fact or constituted a direct obstacle to access to the banking market in view of their effects. He found that since the French legislation at issue was neither directly discriminatory nor intended to regulate access to the banking market it was necessary to examine the effect of the national rules. Whilst Mr Tizzano found that this was an issue of substance reserved to the national court, he sought to provide guidance as to how such an assessment should be conducted. In his opinion, before finding that the rule was caught by Article 43 EC, the national court should assess whether the *effect* of the rule prevented subsidiaries of foreign banks from “competing effectively” with banks traditionally established in the national territory. Thus, an investigation would be necessary as to whether it would be possible for banks to raise their capital through other forms of deposits which could be remunerated freely and thus compete effectively among themselves. If that were not the case, it would be more difficult for foreign banks to raise capital than French banks, which enjoy an advantageous position in the deposit’s market through their large branch networks, and therefore there would be a discriminatory effect. Furthermore, in this case, the rules at issue would deprive foreign banks of the “*only effective* means of acquiring customers” in the French market, thereby directly impeding access to the French banking market.<sup>14</sup> Mr Tizzano then analysed the French Government’s contention that such rules were in any event justified by the need to protect the consumer: the rule aimed, it was argued, at maintaining basic banking services free of charge, thus encouraging medium and long term saving and curbing inflation. He found that whilst the aim of the rules was indeed compatible with Community law, their effect was not proportionate. A less restrictive means to achieve the same aim would be to fix

14. Opinion, para 89, emphasis added.

a maximum ceiling on interest rates for sight accounts,<sup>15</sup> so as to encourage medium and long term saving; and to offer an alternative to consumers between non-interest bearing sight accounts with free banking services, and, if necessary, interest bearing accounts with fee-paying banking services. Therefore, Mr Tizzano concluded that *if* such rules constituted a barrier to the freedom of establishment, they would not be justified.

### 3. The Court's ruling

Partially following Mr Tizzano's analysis, the Court held that the measures at stake were unjustified restrictions to the freedom of establishment. After having found that Directive 2000/12 was not relevant, it repeated a familiar formula according to which all measures "which prohibit, impede or render less attractive" the exercise of the freedom of establishment are caught by Article 43 EC.<sup>16</sup> It then found that the rules at issue constituted "a serious obstacle" to the pursuit of banking activity of companies from other Member States through subsidiaries in France, "affecting their access to the market", and therefore were a restriction within the meaning of Article 43 EC.<sup>17</sup> To substantiate this finding, the Court followed Mr Tizzano's line of reasoning, although it made the assessment of the existence of both obstacle and justification itself, rather than leaving it to the *Conseil d'État*. The Court found that such rules would deprive foreign companies "of the possibility of competing *more effectively*" with domestic institutions which have an extensive network of branches.<sup>18</sup> Where subsidiaries of foreign credit institutions seek to enter the market, "competing by means of the rate of remuneration paid on sight accounts constitutes one of the *most effective* methods to that end. Access to the market by those establishments is thus made more difficult by such a prohibition".<sup>19</sup> The Court then analysed the French Government's contention that there were other means for banks to compete, such as the 15-days accounts which could be remunerated. However, the Court found that since those accounts did not allow for the use of cheques or bankcards, they could not remedy the hindrance caused by the prohibition of remuneration

15. In fact this was what the French rule did: it provided for a maximum ceiling on remuneration for sight accounts and accounts for less than 5 years, to be fixed by the committee for Banking and Financial Regulation or the Minister responsible for the economy. The ceiling for sight accounts was then fixed at 0%.

16. Para 11.

17. Para 12.

18. Para 13, emphasis added.

19. Para 14, emphasis added.

on sight accounts. Turning to the justification of the measure, the Court held that even “supposing” that maintaining basic banking services free of charge might present certain benefits for the consumer, the rules went beyond what was necessary. In the Court’s opinion, the choice could be left to the consumer to decide between remunerated sight accounts with fee-paying banking services, and non-remunerated accounts free of charge. Lastly, examining the French contention that the measure was also aimed at encouraging long and mid-term saving, the Court found that even though such rule was “indeed suitable for encouraging medium and long term saving, it nevertheless remain[ed] a measure which [went] beyond what is necessary to attain that objective”.<sup>20</sup>

#### 4. Analysis

In *Caixa-Bank* the Court did not take on board Mr Tizzano’s suggestion to delimit the scope of Article 43 EC, instead restating the familiar *Gebhard* formula. Once again it therefore refused to reduce the scope of the free movement of persons provisions to a more manageable size. If the Court seems to endorse a market access test, it is a very different test than that suggested by scholarship and Advocates General;<sup>21</sup> it is a test which fails to define the outer limits of the persons provisions, thus potentially allowing scrutiny of any measure regulating an economic activity. Furthermore, in this, as in many cases before, the Court clearly indicated its willingness to act as the watchdog of the way national authorities choose to exercise their discretion in the economic field. Thus it directly assessed the effect and proportionality of the rules under scrutiny rather than follow Mr Tizzano’s suggestion that such an assessment should be left to the national court. Whilst,

20. Para 23. The *Conseil d’Etat* subsequently (23 Feb. 2005) found in favour of Caixa-Bank and unusually ordered damages to be paid; as a result the French legislation was amended in March 2005 to reflect the rulings of the ECJ and the *Conseil d’Etat*, cf. *Le Monde*, “Le Conseil d’Etat entérine la rémunération des comptes courants”, 23 Feb. 2005.

21. Cf e.g. A.G Jacobs’ Opinion in Case C-412/93, *Société d’importation Édouard Leclerc-Siplec v. TFI Publicité SA*, [1995] ECR I-179; A.G. Fennelly’s Opinion in Case C-190/98, *V Graf v. Filzmoser Maschinenbau GmbH*, [2000] ECR I-437; A.G. Poiares Maduro’s Opinion in Case C-446/03, *Marks and Spencer plc v. David Halsey (HM Inspector of Taxes)*, Opinion delivered on 7 April 2005, case pending, nyr; Weatherill, “After *Keck*: some thoughts on how to clarify the clarification” 33 CML Rev. (1996), 885; Barnard “Fitting the remaining pieces into the goods and persons jigsaw?” 26 EL Rev. (2001), 34. See also the Commission’s and Member States’ pleadings in Case C-190/98, *V Graf v. Filzmoser Maschinenbau GmbH*, [2000] ECR I-437 and Case C-176/96, *Jiry Lehtonen, Castors Canada Dry Namur-Braine ASBL v. Fédération Royale Belge des Sociétés de Basket-ball ASBL*, [2000] ECR I-2681.

then, the case does not depart from previous case law on the free movement of persons, some perplexities might arise from the way in which the Court conducts its assessment of both effect and justification of the rules. This annotation will consider three main issues: first, the implications of the Court's reasoning on existing case law; secondly, the way the Court carries out the justification assessment; and thirdly, the way the broad approach to the free movement provisions affects not only the regulatory competence of the Member States, but also the Community's regulatory competence as well as the way such competence might be exercised.

#### 4.1. *The effect of the rules*

Once again the Court embraced an overly broad definition of a barrier falling within the scope of freedom of establishment. And one could well be inclined to speculate whether this is not a deliberate policy choice to hasten the pace of integration by putting pressure on the Member States to harmonize business rules.<sup>22</sup> After all, commentators have already noted that the expansion of the free movement provisions often coincided with a desire to actively encourage the adoption of rules at Community level,<sup>23</sup> since in many fields the ambitions of a common market are better met by providing inter-State operators with a single regulatory framework. But it could also be argued that the Court's perception of its role and of the European economic constitution has evolved to impose a general proportionality scrutiny of measures regulating the market place (and even of many rules which have little if anything to do with the market).<sup>24</sup> In any case, whatever the reasons which led the Court to embrace, once again, such a broad interpretation of Article 43 EC, it is necessary to assess the implications of the ruling here noted, and to ask oneself whether some of the earlier case law still stands. In particular, it should be queried whether one of the effects of the expansion of the material scope of the free movement of persons provisions, and especially of Ar-

22. Cf. the disagreements surrounding the Commission's proposal for the Services Directive (COM(2004)2 final/3); see the press release issued after the Brussels European Council (22–23 March 2005) of 23 March 2005; the Council found a compromise between those who opposed the proposed directive for fear of social dumping (e.g. France and Germany) and those who favoured it in the name of liberalization (e.g. the UK). [www.eu2005.lu/en/actualites/communiqués/2005/03/22conseurserv/index.html](http://www.eu2005.lu/en/actualites/communiqués/2005/03/22conseurserv/index.html). But see the critical draft report of the European Parliament (2004)/0001 (COD).

23. E.g. Weatherill, "After *Keck*: some thoughts on how to clarify the clarification", 33 CML Rev. (1996), 885, esp. 906.

24. Cf. Spaventa, "From *Gebhard* to *Carpenter*: Towards a (non-)Economic European Constitution", 41 CML Rev. (2004), 743.



articles 43 and 49 EC, is not to neutralize the compromise between internal market and domestic regulatory competences reached in *Keck*.<sup>25</sup>

In *Keck*, the Court accepted that some trading rules (certain selling arrangements) fall in principle within the regulatory competence of the Member States, and should therefore not be scrutinized as to their necessity and proportionality unless directly or indirectly discriminatory.<sup>26</sup> The same approach was adopted in *Semeraro Casa Uno*,<sup>27</sup> where the Court found that Sunday trading rules fell outside the scope of Article 43 EC since they were not discriminatory; their purpose was not to “regulate the establishment” of undertakings; and any effect they had on the freedom of establishment was too uncertain and indirect to constitute a barrier relevant for Article 43 EC purposes. However, if the thrust of the ruling in *Caixa-Bank* were to be followed, then this type of rules would no longer be shielded from the proportionality assessment demanded by the application of the free movement provisions, and the balancing exercise would be relocated from the hands of the legislature to those of the judiciary.<sup>28</sup>

This is the case since in *Caixa-Bank* the Court failed to follow Mr Tizzano’s opinion in one important respect. Mr Tizzano instructed the national court to determine whether the prohibition on remuneration prevented foreign subsidiaries from competing effectively, or whether there were other “significant” ways to compete. Thus, he implicitly accepted that in order for a rule to fall within the scope of the Treaty, it is not enough that it should restrict *one* way of competing; rather, to be caught by Article 43 EC, the rule must deprive the new market entrant of “*the*” effective way of competing. This analysis is comparable to, and compatible with, the approach adopted by the Court in relation to advertising bans in the context of the free movement of goods: whilst a total ban on advertising might be considered as in-

25. Joined Cases C-267 & 268/91, *Keck and Mithouard*, [1993] ECR I-6097.

26. Following the ruling in Case C-405/98, *Konsumentombudsmannen (KO) v. Gourmet International Products AB (GIP)*, [2001] ECR I-1795 it could have been argued that selling arrangements which totally prevent market access would also be caught (regardless of discrimination). However, in Case C-322/01, *Deutscher Apothekerverband eV v. 0800 DocMorris NV, Jacques Waterval*, judgment of 11 Dec. 2003, nyr, the Court returned to a purely discriminatory assessment. This said, Case C-239/02 *Douwe Egberts NV v. Westrom Pharma NV, Christophe Souranis and Douwe Egberts NV v. FICS-World BVBA*, judgment of 15 July 2004, is slightly confusing on the matter.

27. Joined Cases C-418–421/93, *Semeraro Casa Uno et al. v. Sindaco del Comune di Erbusco et al.*, [1996] ECR I-2975.

28. The fact that *Semeraro* concerned a domestic supermarket is immaterial, as it played no role in the reasoning of the Court – which did not exclude the application of Art. 43 EC for that reason, but rather because the effect of the rules was too uncertain and indirect for them to be qualified as a barrier falling within the scope of the freedom of establishment.

herently discriminatory because of the difficulties that new brands encounter in penetrating the market,<sup>29</sup> a ban on just *one way* of advertising needs to be scrutinized as to its *effects* before being caught by Article 28 EC.<sup>30</sup>

In *Caixa-Bank*, however, the Court declared the rules at issue as falling within the scope of the Treaty without carrying out any factual assessment. Instead, it considered it as a self-evident truth that remuneration on sight accounts was “one of the most effective” ways to compete for subsidiaries of foreign banks, and was therefore a barrier to the freedom of establishment. In order to justify this statement the Court referred to the fact that existing credit institutions have an extensive network of branches which allows them greater opportunities to raise capital from the public.

Unless the ruling is confined to the facts of the case, it might therefore be interpreted as authority to hold that *any* rule restricting *effective* ways of competing is caught by the Treaty prohibition and needs to be justified, at least when existing market actors benefit of an extensive retail network which is usually not immediately available to new market entrants. If this were true, the ruling at issue would overrule previous rulings and in particular the ruling in *Semeraro Casa Uno*. There are then two closely related issues that deserve analysis in relation to the Court’s assessment of the effect of the rules: first, whether the Court’s reasoning is convincing; secondly, the implications of such reasoning for future case law. In other words, are rules which restrict the *way* undertakings compete with each other now caught by the Treaty regardless of any legal or factual discrimination?

#### 4.1.1. “One of the most effective ways to compete”

As said above, the Court held that remuneration on sight accounts can be construed as a barrier to the freedom of establishment since it is one of the most effective ways for subsidiaries of foreign banks to compete with domestic banks. However, no empirical evidence is referred to in order to support the statement that this is actually the case. Sight accounts are mainly used for everyday transactions, not for investment/savings purposes; the balance on those accounts fluctuates continuously thus making earnings from interest not very significant. In the case of banking services, it is difficult to imagine that the very low interest rates paid on small balances are crucial to consumers’ choices (whilst the higher interest rates paid on mid and long term accounts, allowed by the French legislation, might well bear more im-

29. *Gourmet*, cited *supra* note 26.

30. E.g. Joined Cases C-34–36/95, *Konsumentombudsmannen (KO) v. De Agostini (Svenska) Förlag AB v. TV Shop I Sverige AB*, [1997] ECR I-3843; Case C-71/02, *H Karner Industries-Auktionen GmbH v. Troostwijk GmbH*, judgment of 25 March 2004, nyr.

pact on consumers' preferences).<sup>31</sup> Exception given for internet banking which usually grants a more generous rate of remuneration, the interest rates on sight accounts, where any remuneration is given at all, vary across Europe between 0.25 percent and 2 percent, and most banks require minimum deposits before remunerating the account.<sup>32</sup> Take the example of the UK where remuneration is allowed: on balances up to £ 1999, the interest rate of high street banks varies from a meagre 0.1 percent to a hardly more generous 0.5 percent. A customer who left £ 1999 in her account without withdrawing any money for a year would therefore earn between, £ 1.90 and, £ 9.50 – it seems rather unlikely that the prospect of such generous earnings is a determinant factor in the consumers' choice of bank.

Furthermore, even should remuneration on sight accounts be considered an effective way to compete, it is by no means the only nor the most effective one. Banks can as effectively compete on interest rates on mid and long term accounts, customer service, advantageous conditions on related products (e.g. mortgages, insurance policies, exchange rates, investment services), and prices on fee paying services. It therefore seems that the Court effectively construed a limitation on *one way* to compete (regardless of its effectiveness) as a barrier to market access falling for that sole reason within the scope of the Treaty.<sup>33</sup> The qualification of a rule regulating a *way* to compete as a *per se* restriction on market access relevant for the purposes of the free movement provisions means that the notion of market access is so broadly construed that almost any rule can be qualified as a barrier. As in other recent cases relating to the freedom of establishment, in this case it was the very existence of the rules which created a barrier (if a barrier were indeed there),<sup>34</sup> not its application to a foreign company. In other words, there was

31. The European average remuneration for sight accounts is a mere 0.21% (source *Le Monde*, "Légalisée en mars, la rémunération des comptes bancaires ne devrait pas bouleverser les pratiques", 10 Feb. 2005). Interest rates on sight accounts offered in the UK vary usually between 0.1 to 1.15% on sums up to £ 10,000; by comparing the rates offered by high street banks it seems that the UK based banks are not very eager to compete on interest rates on current accounts. This is so much so that, for instance, Barclays Bank does not even mention its interest rates for current accounts in its website.

32. Source *Le Monde*, "Légalisée en mars, la rémunération des comptes bancaires ne devrait pas bouleverser les pratiques", 10 Feb. 2005.

33. Furthermore, the fact that the restriction of *one way* to compete can be defined as a barrier relevant for free movement purposes seems also at odds with the Court's finding in Case C-376/98, *Germany v. European Parliament and Council* (Tobacco Advertising), [2000] ECR I-8419, that a restriction of a form of competition is not tantamount to a distortion of competition (cf. esp. para 113).

34. Cf. White, "In Search of the Limits to Article 30 of the EEC Treaty", 26 CML Rev. (1989), 235, esp at 246; A.G. Tesaro's Opinion in Case C-292/92, *Hünernmund and Others v. Landesapothekerkammer Baden-Württemberg*, [1993] ECR I-6787; and Spaventa, op. cit. *supra* note 24.

no intra-Community specificity to the case at stake, as any new market entrant, regardless of its country of incorporation, would have faced the same ordeal in penetrating the French market.

Finally, the fact that rules merely regulating one way of competing fall now, for that sole reason, within the scope of Article 43 EC is at odds with the *Semeraro* approach.<sup>35</sup> Take by way of example rules prohibiting retailers from opening at night and on Sundays (similar to those at issue in *Semeraro* itself). There can be no doubt that *one way to compete* (and, intuitively, quite an effective one) for a supermarket wishing to enter a new market would be to open 24 hours a day 7 days a week, as it would attract a niche of consumers (night-workers, people who work long hours) who might not be catered for if opening hours are restricted. Under pre-*Caixa-Bank* case law such rules would not have constituted a restriction on the freedom of establishment and would have escaped scrutiny altogether. However, following the judgment in *Caixa-Bank*, such rules – by making it more difficult for new market entrants to compete with established operators, who naturally have an inherent competitive advantage since already present on the territory and known to the consumers – could be construed as a barrier to market access in need of scrutiny. Thus, as we have seen in other fields and especially in relation to advertisement,<sup>36</sup> rules which were deemed in *Keck* to be, lacking harmonization, within the regulatory competence of the Member States, might now well fall within the scope of the Treaty and demand a proportionality assessment. It would be legitimate then to ask oneself, or the Court, what was the point of *Keck*?

#### 4.2. *The justification of the rules*

Critical as one might be about the Court's qualification of the rules at issue as barriers to the freedom of establishment, it is difficult to be surprised. I

35. One could also argue that the rules at issue in the case here noted were comparable to restriction on prices which, in the case of goods, have been qualified as selling arrangements and, even in the dark years of the Sunday trading cases, have been subjected to scrutiny only insofar as discriminatory or protectionist in their effects, e.g. Case 65/75, *Tasca*, [1976] ECR 291; Case 229/83, *Association des Centres distributeurs Edouard Leclerc and others v. SARL 'Au ble vert' and others*, [1985] ECR I; and post-*Keck*, Case C-63/94, *Groupeement National des Négociants en Pommes de Terre de Belgique (Belgapom) v. ITM Belgium SA and Vocarex SAi*, [1995] ECR I-2467.

36. Rules on advertising constitute a selling arrangement falling outside the scope of Art. 28 EC unless discriminatory and possibly if totally preventing market access; however, rules on advertising also fall within Art. 49 EC (unless totally ancillary to the sale of goods, cf. Case C-71/02, *H Karner Industries-Auktionen GmbH v. Troostwijk GmbH*, judgment of 25 March 2004, nyr) and are therefore usually scrutinized under that provision regardless of discrimination. See e.g. *De Agostini*, cited *supra* note 34, and *Gourmet*, cited *supra* note 26.

have argued previously in this journal that there is mounting evidence that the Court is willing to scrutinize almost any rule regulating an economic activity, and the ruling in *Caixa-Bank* is no exception.<sup>37</sup> However, market rules reflect policy choices which in some cases, as in this one, might well be rather complex, pursuing a number of different objectives ranging from economic policy to consumer protection and welfare choices. Once the link between obstacle to movement and rule falling within the scope of the Treaty is *de facto* severed (although maybe maintained in theory), one would expect a very careful scrutiny of the justifications for rules which merely regulate market behaviour. After all, lacking harmonization, those rules should fall primarily within the scope of the Member States' regulatory autonomy. It should in fact be remembered that in the absence of any discrimination, it is impossible for the Member States to have a double regulatory regime, one for domestic operators and one for foreign ones. If rules such as qualification requirements,<sup>38</sup> capital requirements<sup>39</sup> and so on, can be applied selectively – i.e. to those who are wholly regulated by the host State but not to those who are regulated elsewhere – this is not possible for non-discriminatory market regulation. In the absence of discrimination/double burden, a finding of incompatibility with the Treaty means that the rule has to disappear from the statute books, as it would be impossible to have a dual regulatory regime for companies established and subject to the regulatory regime of the same country on the sole grounds that one is a subsidiary of a company incorporated elsewhere whilst the other is not. Thus, in such cases, a finding of incompatibility deprives the Member States of the ability to regulate their market place in that particular manner.<sup>40</sup>

For this reason, one would expect some caution on the part of the Court. And there might be some merit in arguing that a committee of experts is better placed than a supranational court to strike, if not the “right” balance between conflicting policy aims, at least a reasonable one. It is all the more striking then that the Court would devote so very little attention to assessing the proportionality of the rules at stake. In justifying its measures, the French Government relied on two policy aims: first of all, the prohibition on remuneration on sight accounts was aimed at ensuring that basic banking services

37. Spaventa, *op. cit. supra* note 24.

38. E.g. Case C-340/89, *I Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg*, [1991] ECR I-2357.

39. E.g. Case C-212/97, *Centros Ltd v. Erhvervs- og Selskabsstyrelsen*, [1999] ECR I-1459.

40. Unsurprisingly then, the French rules have been amended and remuneration for sight accounts is now allowed for all credit institutions, cf. *Le Monde Argent*, “Comptes rémunérés: un marché de dupes”, 27 Feb. 2005.

would be free of charge; secondly, the rules were aimed at encouraging mid and long term saving.

The Court was not persuaded. In relation to the first claim, it recognized that consumers “might” benefit from free basic banking services. However, it held that the rules were not proportionate since the choice between remunerated fee paying accounts and non-remunerated free accounts could be left to the consumer. There is no real analysis as to the effect of disposing of such rule. Would market forces lead towards remunerated accounts with the risk of the consumer not being able to choose between free and fee paying accounts? And would the welfare/redistributive aims of the policy then be affected? Low income consumers might well lose from fee paying/ remunerated accounts as the relatively low balance on their account might mean that the interest earned is less than the expenses incurred. On the other hand, high earners might be better off. Moreover, even when remunerated accounts are free of charge, they often come with some nasty ties such as hidden charges or heavy penalties for overdrafts.<sup>41</sup> Those would naturally affect the more vulnerable consumers who might well be attracted by the prospect of earnings which are in fact minimal, and end up facing unforeseen small print.

Secondly, in relation to the aim of encouraging mid and long term savings, the Court simply stated that even though prohibiting remuneration for sight accounts is “indeed suitable” to encourage savings, it “goes beyond what is necessary to attain that objective”.<sup>42</sup> No explanation is provided for this statement. Mr Tizzano stated that it was “improbable” that there were no less restrictive means to achieve the purported aim; he however left it to the national court to determine such issue as it could not be excluded that “circumstances [could] emerge or arguments [be] put forward” to justify such rules. It is unfortunate that the Court did not follow suite.

#### 4.3. *The broader picture*

It is clear that the interpretation of the free movement provisions is of constitutional significance. Thus, the broader the scope of the Treaty, the more national policies can be subjected to the proportionality scrutiny demanded by European law. But the partial loss of sovereignty deriving from a broad interpretation of the free movement provisions is not the only constitutional effect of negative integration. The definition of what constitutes an obstacle to free

41. Cf. the report published by *Le Monde*, “La plupart des consommateurs européens sont mécontents”, 7 Oct. 2004, which was especially critical of the UK banking system for lack of protection of consumers from banks unilaterally imposed charges.

42. Para 23.

movement is also relevant in establishing or excluding harmonizing competence in relation to internal market competence.<sup>43</sup> Wyatt has analysed this problem in relation to the health care cases,<sup>44</sup> pointing at how the expansion of the scope of Article 49 EC to encompass also publicly funded medical services might establish at least a partial harmonizing competence in the field of health care despite the prohibition contained in Article 152 EC.<sup>45</sup> Unless the definition of obstacle to movement relevant for harmonizing purposes is different from that adopted in relation to the free movement provisions, an expansion of the scope of the Treaty determines also an expansion of the regulatory competence enjoyed by the Community.

However, this is not the only effect that the Court's case law might have on the Community's ability to regulate the market place; another problematic issue might also derive from the very finding of disproportionality of a given type of rules. In this respect it could be argued that once the notion of obstacle to movement is broadened to encompass truly non-discriminatory rules, a finding of disproportionality of a domestic rule has not only the effect of depriving the national authorities of their regulatory competence, but also of curtailing the discretion of the Community institutions. In other words, if and once a rule which prohibits remuneration on sight accounts has been found by the ECJ to be disproportionate,<sup>46</sup> it is not clear that a similar rule adopted by the Community institutions could stand the proportionality scrutiny without creating a fracture in the consistency of the Community legal and constitutional system. It is worth analysing briefly this problem.

The outcome of the proportionality scrutiny varies according to the type of rules at issue and the amount of discretion enjoyed by the institution which has adopted the rule.<sup>47</sup> In particular a finding of disproportionality of

43. Cf. Case C-376/98, *Germany v. European Parliament and Council* (Tobacco Advertising), [2000] ECR I-8419.

44. Case C-157/99, *B S M Geraets-Smits v. Stichting Ziekenfonds VGZ and Peerbooms v. Stichting CZ Groep Zorgverzekeringen*, [2001] ECR I-5473; Case C-368/98, *A Vanbraekel et al. v. Alliance nationale des mutualités chrétiennes*, [2001] ECR I-5363; C-385/99, *V G Müller-Fauré v. Waarborgmaatschappij OZ Zorgverzekeringen U A and E E M van Riet v. Onderlinge Waarborgmaatschappij Z A O Zorgverzekeringen*, [2003] ECR I-4509; C-56/01, *Patricia Inizan v. Caisse primaire d'assurance maladie des Hauts de Seine*, [2003] ECR I-12403.

45. Wyatt "Community Competence to Regulate Medical Services" in Dougan and Spaventa (Eds.), *Social Welfare and EU Law* (Hart Publishing 2005), p. 210. See also Snell, "Who's Got the Power? Free Movement and Allocation of Competences in EC Law", 22 YEL (2003), 323.

46. On the other hand a finding of non-proportionality made by a national court would not be problematic for the Community legislature.

47. Cf. the extensive analysis by de Búrca, "The Principle of Proportionality and its Application in EC Law", 13 YEL (1993), 105.

a rule creating an obstacle to movement at national level does not usually curtail the discretion of the Community institutions to adopt exactly the same rule, or even a more trade-restrictive rule, at Community level. Indeed, in the scrutiny of Community legislative measures the Court is willing to recognize the discretion of the political institutions and, refusing to substitute its own judgment for that of the legislature, to limit its scrutiny to check that the measure is not manifestly inappropriate to pursue its purported aim.<sup>48</sup> On the other hand, the scrutiny of national measures which create an obstacle to free movement is more pervasive often encompassing a check as to whether there are no less restrictive measures available.<sup>49</sup> Thus, it is not surprising that, normally, the Court's finding of disproportionality of a national rule should bear no relation to the assessment of a similar harmonized rule at Community level.

Take for instance the example of rules applicable to posted workers: in *Mazzoleni*, the Court indicated that to automatically require a company which only occasionally and for short periods of time posted its workers in another Member State to comply with that State's minimum wage requirement might be disproportionate as it imposes a heavy administrative burden on the company.<sup>50</sup> On the other hand, Directive 96/71 on posted workers in principle requires the employer to comply with the most favourable minimum wage regime.<sup>51</sup> Despite its finding in *Mazzoleni*, it is extremely unlikely that the Court would find such Community legislative regime disproportionate.<sup>52</sup> The same reasoning applies for, for instance, composition

48. Cf. e.g. Case C-233/94, *Germany v. Council and European Parliament* (deposit guarantee scheme), [1997] ECR I-2405, esp. para 56; and more recently Case C-491/01, *British American Tobacco v. Secretary of State for Health*, [2002] ECR I-11453, esp. para 123.

49. Cf. e.g. *Payroll Data Services*, *supra* note 1; *Müller-Fauré*, *supra* note 44. The Court does not always perform the proportionality assessment, since the proportionality assessment is often treated as a matter of fact reserved to the national court, see e.g. *Gourmet*, cited *supra* note 26.

50. Case C-165/98, *Mazzoleni and Inter Surveillance Assistance SARL*, [2001] ECR I-2189.

51. Directive 96/71, concerning the posting of workers in the framework of the provision of services, O.J. 1997, L 18/1. According to Art. 3(4), Member States might decide, together with the relevant collective organizations, to exempt from such requirement purely occasional work if its duration is less than one month over a year; however in the absence of such exemption the harmonized regime introduced by the Directive applies.

52. But it cannot be excluded that the Court might be willing to adopt a *Baumbast* type approach and impose upon national authorities a general proportionality requirement in applying the black letter of Community provisions, although this is probably more unlikely to happen in cases in which the application of such requirement would act to the detriment of workers (even though the Court has left the door open to this possibility by stating that the Directive codifies previous case law including the principle of proportionality, Case C-341/02, *Commis-*



requirements for foodstuffs which very seldom survive the proportionality assessment if imposed by national authorities, but which are often subject to harmonizing legislation.<sup>53</sup>

The difference in the outcome of the proportionality assessment in those cases can be easily explained having regard to two main reasons. First of all, in the case of scrutiny of national rules, the situation or the product is already regulated by the home State, and therefore consumer and welfare concerns have already been taken into due account by one of the legislatures. Secondly, and more importantly, in the case of the free movement provisions the two interests to be balanced are that of free movement and of the relevant aim (which has usually already been considered once by the home State). But in a harmonized regime, the free movement interest is guaranteed by the very fact that the rules have been harmonized, and so the assessment of proportionality needs to balance the relevant public interest *vis-à-vis* economic freedom. It is not surprising then that the Court would recognize the legitimacy of political discretion and refuse to substitute its judgment for that of the institutions.

This consistent framework however might well be subjected to undue strain once the rules which are defined as obstacles do not affect in a specific way the intra-Community situation. In the ruling here noted, Caixa-Bank would be regulated, as far as its transactions in France were concerned, only by French legislation. The Spanish rules on remuneration of accounts would not apply to the bank's French subsidiaries. The regulatory competence lies, consistently with Directive 2000/12, with the French authorities. In penetrating the French market Caixa-Bank would encounter exactly the same difficulties as those faced by any new market entrant (regardless of place of incorporation). The fact that Caixa Bank happened to be incorporated in Spain was rather immaterial to the effect of the rules on its ability to successfully gain market shares.

If an obstacle to intra-Community *movement* is so broadly construed as encompassing mere restrictions on the *way* in which an undertaking decides

*sion v. Germany*, judgment of 14 April 2005, nyr). Cf. Dougan and Spaventa, "Educating Rudy and the (non-)English Patient: A double-bill on residency rights under Article 18 EC", 28 EL Rev. (2003), 699.

53. Consistent case law, e.g. Case 788/79, *Gilli and Andres*, [1980] ECR 2071; Case C-358/95, *T Morellato v. Unità Sanitaria Locale 11 Pordenone*, [1997] ECR I-1431; Case C-123/00, *C Bellamy and English Shop Wholesale SA*, [2001] ECR I-2795. Several directives have been adopted in relation to foodstuff (eg Directive 2000/36, relating to cocoa and chocolate products intended for human consumption, O.J. 2000, L 197/19). The validity of the food supplements directive (Directive 2002/46, O.J. 2002, L 183/51) has now been challenged *inter alia* in rela-

to compete, the proportionality assessment will weight the undertaking's interest in choosing how to better pursue its market strategy with the public interest invoked. Thus, without any discrimination, without any issue of double burden, and without any cross-border specificity to the situation at stake, the Court in its proportionality assessment necessarily has to take into account (even though it might not say so explicitly) not the obstacle to movement *vis-à-vis* the public interest invoked, but rather the restriction on the economic operator's freedom to trade *vis-à-vis* the public interest invoked. If this is so, then it becomes more difficult to understand how the assessment of the proportionality of a similar rule enacted by the Community rather than the national legislature could lead to a different result. After all, in assessing the proportionality of Community legislative acts the Court would have to weight exactly the same interests, i.e. economic freedom and consumer protection/economic policy objectives. Therefore, either the Court would have to substitute its own assessment for that of the Community legislature or there would be a fracture in the consistency of the system which would be difficult to explain without accusing the Court of being biased in favour of Community harmonizing rules. In this sense, the finding of disproportionality of a national rule construed as an obstacle to movement might well curtail the Community legislature's discretion in pursuing the public interest as it deems best.

## 5. Conclusions

The ruling in *Caixa-Bank* is consistent with the broad interpretation adopted in the field of free movement of persons, and in many ways is a good example of the problems which might arise when the legitimacy of non-discriminatory market rules are assessed directly by the Court in a preliminary ruling procedure, by nature inimical to complex fact finding exercises.<sup>54</sup> This said, the reasoning of the Court is somewhat unsatisfactory – especially the assessment of the justifications – leaving the reader with the uncomfort-

tion to its proportionality. See Joined Cases C-154 and C-155/04, *Alliance for Natural Health Nutri-Link Ltd v. Secretary of State for Health and The Queen National Association of Health Stores Health Food Manufacturers Ltd v. Secretary of State for Health and National Assembly for Wales*, Opinion delivered on 5 April 2005, case still pending.

54. Cf. the conflicting findings reached in the Rioja cases: Case C-47/90, *Etablissements Delhaize Frères et Compagnie Le Lion SA v. Promalvin SA and AGE Bodegas Unidas SA*, [1992] ECR I-3669; and Case C-388/95, *Belgium v. Spain (Rioja)*, [2000] ECR I-3123 annotated by Spaventa, 38 CML Rev (2001) 211.

able sensation that it is based on vague and intuitive rather than factual findings. Once again market access is used as a trump card to dispose of rules which are perceived as undue and unjustified restrictions on both the undertakings ability to choose how best to pursue their economic activity, and on the consumers' possibility to choose from a range of different products. Not only is it not clear that the balancing exercise performed by the Court is more persuasive than that effectuated by the competent banking authorities, but also, and more importantly, the constitutional effects of such findings might be more pervasive than appears at first sight.

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